IN THE SUPREME COURT OF MISSOURI

No. SC87061

CONSECO FINANCE SERVICING CORPORATION., n/k/a GREEN TREE SERVICING, LLC., JOHN C. WREN, JR. and SHANNON ALLEY,

Respondents,

v.

MISSOURI DEPARTMENT OF REVENUE,

Appellant.

Appeal from the Circuit Court of St. Louis County, Missouri
The Honorable Kenneth Romines

REPLY BRIEF

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ARGUMENT

The abandoned manufactured home statutes address the situation where a home is abandoned on another person's property. The land owner can request an abandoned title from the Department of Revenue.

Conseco claims, on page 12 of its brief that "[o]ut of frustration, the Department of Revenue finally instructed counsel for Conseco to get an injunction or 'stay order' to prohibit the issuance of any titles" is inaccurate and misleading. There is no proof of any "frustration" on the part of the Department. Prior to this suit, lienholders had obtained stay orders or repossessed the homes. [LF 209-10, ¶ 7-10] Further, no lienholder requested a stay order for the home at issue here. The cited fax, LF 173, plainly involves a group of homes, but not the one involved herein.

After receipt of the request for an abandoned title, the Department sends notice to the address provided to it by the owner and the lienholder. These addresses are listed on the title to the home. LF 156, ¶ 9-10; §§ 700.320, .350, .355, .360, RSMo. 2000.[1] If the owner or the lienholder want to change their address, they can do so. § 700.360, 12 CSR 10-23.446. The

[1] Unless indicated, all references are to Missouri Revised Statutes, 2000.

Owner need not use the address of the titled home.

The Department followed the statutory procedure in this case. It sent notice to the listed address of the Owners and the lienholder. [LF 89, ¶ 19; 95] Neither the owners, nor the lienholder responded to the notices. The Department issued an abandoned title. [LF 90, ¶ 22; 158, ¶ 19]

1. The statutes are not vague.

Conseco's[2] claim of statutory vagueness centers on two provisions: the definition of "abandoned;" and an alleged conflict between statutory provisions. But these arguments are based on hypothetical facts, not actual occurrences.

The lack of specifics on this point is fatal. A vagueness challenge cannot be based on hypotheticals, when there is no evidence that the statute is unconstitutionally vague as applied to the party's situation. *State v. Self*, 155 S.W.3d 756, 761(Mo. banc 2005). If a statute can be applied constitutionally, the challenger "will not be heard to attack the statute on the ground that impliedly it might also be taken as applying to other persons or other situations in which its application might be unconstitutional." *State v.*

[2] For brevity, unless otherwise specifically noted, the Respondents will collectively be referred to as "Conseco."

Ellis, 853 S.W.2d 440, 446 (Mo. App. E.D.1993).

"Abandoned" is defined in the statutes as a physical absence from the property, and either: (a) failure by a renter of real property to pay any required rent for fifteen consecutive days, along with the discontinuation of utility service to the rented property for such period; or (b) indication of or notice of abandonment of real property rented from a landlord. § 700.525(1), RSMo.

Conseco's entire vagueness argument as to the definition of an "abandoned" manufactured home consists of two lines:

> Arguably, if an owner of a manufactured home leaves on a three-week vacation, this may constitute an abandonment under the statute. Clearly, this definition is so ambiguous that a person is not able to determine the proscribed conduct when measured by common understanding and practices.

[Brief, p. 14] There is no evidence that these Owners, or any other owners, took a vacation and had their home declared abandoned.

Conseco's own example demonstrates why the statute is not vague. A vacation would not be a failure to pay any rent, nor involve discontinuation of utility service. A vacation does not indicate, or give notice of, an intent to

abandon the property. A vacation by itself – no matter its length – does not trigger the statute.

In an odd argument, Conseco counters the State's assertion that the vagueness argument herein is based on hypotheticals by claiming that "the Department of Revenue did not provide the trial court with any evidence that the Wren's manufactured home had been 'abandoned.' " [Brief, p. 16] But this argument supports the Department's position.

Neither the Petition, nor the Amended Petition, nor the Second Amended Petition (wherein the Owners, the Wrens, were added as parties) allege that the Wren home was not abandoned. [LF 9-14, 19-31, 85-99] There was no evidence submitted by the Owners or the lienholder that the home in question was not "abandoned" under § 700.525(1), RSMo. In short, neither the Owner nor the lienholder raised abandonment as a factual issue to the trial court. As such, the Department had no evidentiary burden.

The statute gives persons of ordinary intelligence a sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices. See, *State ex rel. Zobel v. Burrell*, 167 S.W.3d 688, 692 (Mo. banc 2005). No vacationer would judge their actions as proscribed conduct under § 700.525(1), RSMo.

For its second argument, Conseco claims that there is a conflict between certain statutory provisions, thereby creating vagueness in the statutes. Specifically, Conseco alleges a conflict between §§ 700.527.1 and .530, and §§ 700.533 and .535, RSMo. But an examination of the statutes does not demonstrate a conflict.

Section 700.527, RSMo., states that a landowner can apply for an abandoned title, "subject to the interest of any party with a security interest in the manufactured home." As to the secured party, § 700.530, RSMo., states that the abandoned home statutes "shall not affect the right of a secured party to take possession of, and title to, a manufactured home."

But the alleged conflicting statutes are consistent with §§ 700.527 and .530, RSMo. Under § 700.533, the owner or lienholder may claim title to the home, against the landowner seeking an abandoned title, by proving either their ownership or the security interest, and paying all reasonable rents due and owing. The owner or the lienholder may voluntarily relinquish any claim by affirmative notice, or by failing to respond to the notice of an application for an abandoned title sent under § 700.531. § 700.535, RSMo.

Further, § 700.537, RSMo. acknowledges that the lienholder may repossess an abandoned manufactured home. It even sets out the procedure

to be followed by the lienholder to notify parties of the application for a certificate of title.

There is no conflict. A land owner can ask for an abandoned title, but that does not prevent the lienholder from seeking to repossess the home. §§ 700.530 and .537, RSMo. The application for an abandoned title does not prevent the owner or lienholder from claiming title to the home, nor does it prevent actions to deny issuance of an abandoned title. § 700.533, RSMo. Further, the statutes state that the owner and the lienholder may lose their interests if they voluntarily waive their rights, or if they remain silent and fail to assert them. § 700.535, RSMo.

The fact that stay orders were sometimes obtained by lienholders further shows that the statutory provisions were not vague. As shown by the correspondence cited by Conseco, the Department had informed lienholders in some cases that unless they had a stay from a court, an abandoned title would issue.[LF 158, ¶ 22] That lienholders would want to prevent the issuance of an abandoned title is understandable, but it fails to show that the lienholders were confused by the statutory terms.

The statutes are not vague. The definition of “abandoned” is sufficiently definite to inform an owner of the actions that could lead to abandonment of

his home. There is no evidence that this did not happen here. Similarly, the statutes tell a lienholder what actions the Department will take after an application for an abandoned title is made, and inform inform both owners and lienholders what actions they can take to obtain the home, and what actions will lead to a loss of their interest.

2. Respondents have been deprived of no Due Process.

Conseco's due process argument focuses on a lack of notice and a lack of hearing. But the Department sent adequate notice, and the Owners and lienholder failed to avail themselves of the statutory provisions permitting them to assert their rights.

A. The notice meets due process requirements.

There is no evidence that notice was sent to an incorrect address. The lienholder does not claim that its notice was sent to the wrong address. Nor does it contend that the notice was not received. The lienholder gives not explanation for why it would sit silent and let the law take its course, when a mere letter in response would have preserved its rights.

Similarly, the Owners do not claim that there was another address where notice should have been sent. Instead, the owners claim that notice sent to the "abandoned" home's address is insufficient, as the Department

knows it will not be received, because the home is “abandoned.” [Brief, p. 25] While perhaps a tacit admission that the home was abandoned, it ignores the fact that due process requires reasonable attempts to notice. The Department is not required to ensure actual notice.

Due process does not require actual notice. It only requires that the government acted reasonably in selecting the means likely to inform the affected persons, and notice by mail is ordinarily presumed constitutionally sufficient. *Nunley v. Dept. of Justice,* 425 F.3d 1132, 1136 (8th Cir. 2005). Due process is satisfied if the notice is mailed to the party’s last known address, as was done in this case. *Truong v. Collector of Revenue,* 46 S.W.3d 589, 590 (Mo. App. E.D. 2001) (tax sale); *Collector of Revenue of City of St. Louis v. Parcels of Land*, 585 S.W.2d 486, 488 (Mo. banc 1979) (foreclosure or tax sales); *Gonzalez v. INS,* 44 Fed.Appx. 770, 771 (9th Cir. 2002) (deportation hearing). Even service of a summons does not automatically require actual notice. Mo. Supreme Court Rules 43.01 and 54.13.

Notice is adequate as long as the notice is reasonably calculated to apprise interested parties of the pendency of the action and to afford them an opportunity to present their objections. *Mullane v. Central Hanover Bank & Trust Co.,* 339 US 306, 314 (1950). Sending notice to the address provided to

the Department by the owner and the lienholder meets the due process requirements. There is no claim that the owner or lienholder had provided the Department with a different address.

This Court has approved under due process sending notice to the last known address for foreclosure. *Collector of Revenue of City of St. Louis v. Parcels of Land*, *supra*. Similarly, the Court of Appeals approved under due process a notice of a tax sale sent to the record address of the Assessor. *Truong v. Collector of Revenue*, *supra*. Here, the Department complied with both the statutory and due process requirements.

Conseco claims that the notice of an abandoned title application was insufficient because it did not state the amount of rent owed. But the amount of any back rent does not change the notice's purpose: to inform the owner and lienholder that a land owner is seeking an abandoned title. Back rent would only be an issue where the home is being redeemed or repossessed, and neither happened in this case.

A party cannot avoid the law by giving an incorrect address, nor by ignoring or failing to pick up a notice. Foreclosures, repossessions, and like actions are not a game of "tag" requiring indisputable proof of notice on a non-paying party. Due process only requires reasonable notice and an opportunity

to assert their rights. Respondents got both.

B. There are statutory provisions to protect rights and obtain a hearing.

Conseco's other due process argument concerns the right to a hearing. Conseco claims that neither the statutes nor the notice provide for a hearing. Further, Conseco claims that requiring the owner or lienholder to claim title by proving their ownership or security interest, and paying all reasonable rents due and owing, requires action without a hearing.

For lienholders, the statutes specifically recognize the right to repossess the home under §§ 400.9-503 and 700.385. § 700.530, RSMo. Owners can assert their interest after notice of an application for an abandoned title by proving ownership and paying of all reasonable rents due and owing. § 700.533, RSMo. In this case, neither the owner nor the lienholder asserted an interest in the home under the statutes.

Lienholders, even if they do not seek repossession, could maintain a valid security interest if they respond to the Department's notice within 30 days. As the security interest is lost through lack of a response to the notice or affirmative statement, the abandoned title is subject to the secured party's interest. *Ferrell Mobile Homes, Inc., v. Holloway*, 954 S.W.2d 712 (Mo. App.

S.D. 1997) (mobile home park owner's right of possession to the abandoned home is dependent upon compliance with § 700.527, RSMo., which provides that abandoned home title is subject to the secured party's interest).

A person whose interest may be lost has an opportunity for a hearing. Missouri law provides that person can appeal to the Administrative Hearing Commission from any decision made by the director of Revenue. § 621.050, RSMo. A person could, if § 621.050 does not apply for some reason, bring an action under § 536.150, RSMo to challenge the Department's decision. An owner or lienholder could seek possession in the circuit court, and disputes as to rent or abandonment could be tried there. All of these actions could be taken prior to the issuance of an abandoned title.

Claiming that the payment of outstanding rent violates due process is nonsensical. Non-payment of rent, just like non-payment of a mortgage or car loan, is the act that leads to loss of an interest.[3] Missouri's procedure for abandoned motor vehicles requires payment of reasonable towing and storage charges. § 304.155.8, RSMo. For an abandoned manufactured home, the statutes require payment of all reasonable rents due and owing. §

[3] Although non-payment of rent, by itself, does not automatically make a manufactured home "abandoned" under the statutes. § 700.525(1), RSMo.

700.533, RSMo.

3. There is no equal protection violation.

Conseco's claims that the law violates equal protection because the "poor" are unable to obtain the same judicial review as the more affluent, as the statutes require the payment of owed rent. [Brief, p. 26] Once again, this argument is based on hypothetical facts. There is no evidence that the poverty of the owner, the lienholder, or anyone else prevented the assertion of rights.

Conseco cites no case holding that inability to pay rent is the basis for an equal protection violation. The cases cited by Conseco do not support an equal protection argument. *Douglas v. California*, 372 U.S. 353, 357 (1963) concerned the right to counsel on a criminal appeal. *Williams v. Shaffer*, 385 U.S. 1037 (1967) was a denial of a writ of certiorari. Conseco's citation (to page 1039) is to the dissent of Justice Douglas, where he points to other cases striking down financial limits on the ability to obtain judicial review. But Justice Douglas acknowledges that he is only discussing criminal cases. *Williams* involved a Georgia civil law requiring a tenant to tender a bond in such sum as might be recovered against him by the landlord.

Applying Respondents' logic means that a party cannot foreclose on real property, repossess personal property, or evict a non-paying tenant, if a poor person is

unable to pay the mortgage, make the payments, or pay the rent. In each case it is the failure to pay, not poverty, that triggers these events.

Conseco's arguments on this point do not demonstrate an equal protection violation. This finding of the trial court should be reversed.

4. There is no violation of 42 U.S.C. § 1983.

The argument on this point is one of semantics, as 42 U.S.C. § 1983 creates no substantive rights and is "merely a vehicle for seeking a federal remedy for violations of federally protected rights." *Alsbrook v. City of Maumelle*, 184 F.3d 999, 1012 (8th Circuit 1999). As such, § 1983 permits parties an avenue to assert their rights in court: i.e., due process, civil rights, etc.

Regardless of how a lawsuit is characterized, a court cannot find that a party is in violation of § 1983, as that section does not grant rights. No one violates another's "1983 rights." The court's finding of a 1983 violation independent of a due porcess, equal protection, or some other constitutional violation is not supportable.

5. There is no windfall in this case.

The first paragraph of Respondents' argument cites this Court's comments concerning a potential windfall to land owners who obtain an

abandoned title, and hence, property presumably worth more than the amount of owed rent and expenses. [Brief, p. 11] But there is no evidence in this record of any windfall, at any time. To assume that windfalls occur also requires an assumption that where neither the owner nor the lienholder try to prevent issuance of an abandoned title or file for repossession, that the home might be worth the same or less than the amount of back rent.

The actual facts in this case demonstrate that over a 5 year period, the Department only issued a total of 258 abandoned titles. [LF 156, ¶ 6] There is simply no evidence to establish how much money went to land owners, if any, over and above the amount of rent owed.

CONCLUSION

The abandoned manufactured home statutes set up a procedure to provide notice to home owners and lienholders. In this case, no one asserted their interest. No one filed for replevin or repossession. No one sought a stay order in the circuit court.

The statutes provide due process and provide equal protection. The language used is not vague. Even if it is shown that the Department misapplied the law, that would not make the statutes facially unconstitutional. The statutes permit promulgation of rules, and any infirmity in the

department’s handling of these titles could be addressed in that manner.

Respectfully submitted,

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Certification of Service and of Compliance with Rule 84.06(b) and (c)

The undersigned hereby certifies that on this 21st day of February, 2006, one true and correct copy of the foregoing brief, and one disk containing the foregoing brief, were mailed, postage prepaid, to:

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The undersigned further certifies that the foregoing brief complies with the limitations contained in Rule No. 84.06(b), and that the brief contains 3,527 words.

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Mark E. Long, Assistant Attorney General